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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ULKU ROWE,

Plaintiff,

v. 19-cv-8655 (LGS)

GOOGLE LLC,

Defendant. Conference

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New York, N.Y.
(**remote**)

May 27, 2021
11:00 a.m.

Before:

HON. LORNA G. SCHOFIELD

District Judge

APPEARANCES

OUTTEN & GOLDEN LLP
Attorneys for Plaintiff
BY: CARA E. GREENE

PAUL HASTINGS LLP
Attorneys for Defendant
BY: KENNETH W. GAGE
SARA B. TOMEZSKO

(Remote)

(Case called)

THE CLERK: The parties' appearances have been noticed for the record. Before we begin, I'd like to remind the parties and anyone else listening that recording or rebroadcasting of this proceeding is prohibited. Violation of this prohibition may result in sanctions. I'm also going to ask counsel to please state your name before you speak, each time you speak, as we have a court reporter present.

We are here before the Honorable Lorna G. Schofield.

THE COURT: Good morning. And thank you for waiting. I know we're a little bit behind schedule. There seems to be the morning for discrimination cases. So this is the second one we're discussing today. And this is a pre-motion conference, so both parties propose motions for summary judgment. The plaintiff proposes bringing a partial motion. The defendant proposes bringing a full motion. And I have read your letters, and I think the way to just cut through this is to give you a sense of what I think. First of all, I don't want to hear argument. I have looked at your letters. And I know that you have claims for gender discrimination and retaliation, under Title VII, the Equal Pay Act, and the NYCHRL. And it seems pretty clear to me that there are questions of fact as to whether the defendant had discriminatory or retaliatory intent, and that it is a virtual

certainty that we would go to trial in this case if it were not resolved. As you know, it can get fact-intensive. It appears that if there are questions of fact and that at least some questions will survive. And so even if the plaintiff is successful, she can only recover damages lost. And it's not really that helpful to dispose of some claims where there's basically one, one set of facts and one set of damages but just different ways of getting at it.

And I know I have experienced counsel on both sides here, so I'll tell you what I typically do or what I would do down the road if this case were to go to trial. And that is that I would make a proposal to the plaintiff to pick a claim that essentially is easy to prove, and if it were, for example, the city claim, the NYCHRL claim, which is mainly because the law is more lenient, as you know, around the NYCHRL, what I typically would do is essentially promise the parties that I would agree to retain supplemental jurisdiction because it's so late in the case and adjudicate the case, and, to simplify the trial for the jury as well as the parties, to just go with the simplest claim or the easiest claim for the plaintiff to prove, assuming the measure of damages is the same. And that simplifies things. But it also illustrates that it's sort of pointless to try to whittle away at the claims at the summary judgment stage. I just think it's not productive in this kind of setting.

And so first of all, I'm, you know, you should know, I can't forbid you from filing a summary judgment motion. So, you know, you don't have to respond by telling me that. I understand that. But talk to me a little bit about why it seems to make sense to you, given what I've just said, if it does, to continue in that way, or perhaps we should think about how else to proceed.

I'll hear from the plaintiff first.

MS. GREENE: This is Cara Greene. Thank you, your Honor.

I think from plaintiff's perspective we agree that one path could be to forgo summary judgment motion practice altogether and proceed to a trial. And we would be prepared to do that. If we are going the path of summary judgment, then we have tried to consider what issues could be resolved that could really simplify for the jury what their role would be. And so with respect to the equal pay claims, we think that those are claims that could be resolved entirely, since there is no issue of intent that's required, or no demonstration of intent or bias that's required with respect to equal pay claims.

On the discrimination claims, it's focusing --

THE COURT: Although -- if I could just interrupt for a second and say two things. One is, I think there may well be a question of fact as to the comparators and whether they're really appropriate, the comparators, and that would be enough

to get the claim to trial as well.

And the other thing that I would say -- and I'll let you continue then; I just don't want to lose my thought -- and that is that I think there probably are issues here. I mean, even based on your letters, it seems like there are issues that are not in dispute. But I typically do not grant summary judgment on elements of claims. I don't think that's appropriate or a really good use of time. But obviously if the parties want to narrow the scope of the trial and can agree to stipulate before trial as to certain issues or as to what evidence would be or testimony would be to try to make it more focused for the jury, that is the way I would typically handle that.

But anyway, I interrupted you. Apologies for that. So go ahead.

MS. GREENE: No problem. Thank you.

Again, though, we, I think our preference would be to forgo summary judgment altogether. If defendants were to pursue their right to file for summary judgment, then I think, at least as to certain aspects around the equal pay claim in their affirmative defense, we would ask for the ability at least to raise those issues.

THE COURT: Understood.

MS. GREENE: I think with respect to comparators, certain comparators may present an issue of disputed fact.

Other comparators, I think there are no issues of disputed fact. And I'm referring specifically to her comparators within OCTO.

The other just one point I wanted to make with respect to looking ahead to trial is that I appreciate the judge's offer to allow us to focus the trial on particular claims without worrying about jurisdictional issues.

The equal pay claims and the discrimination claims do have different damages with respect to liquidated damages that are available under New York Labor Law that are not available under New York City Human Rights Law.

THE COURT: OK. Fair enough. And we could figure out a way to try to make the trial efficient and still take that into account.

Let me ask this as long as you are speaking. The other option, of course, would be to try to resolve the case short of trial, and I'm wondering, I think this is a case where you had a mediation but it was very early on. And if you were to try again, I could either get you a different magistrate judge from Judge Gorenstein, since I know he basically presided over the discovery proceedings, or I could send you to a court-appointed mediator, or you could hire your own mediator. Have you had recent settlement discussions and is that something that you would agree to?

Ms. Greene?

MS. GREENE: Again, Cara Greene. No, we've not had recent discussions, but we're always amenable to seeing if there's a resolution that could be to the benefit of both parties.

THE COURT: OK. Let me hear from the defendant.

MR. GAGE: Sure, your Honor. This is Ken Gage. I guess I would start with just a general reaction that the thing that we struggle with on -- one of the things we struggle with on the defense side here is the scattershot breadth of the plaintiff's claims, in part -- well, let's just focus on the equal pay claims and why we think that they are susceptible to summary judgment. For example, she has through discovery argued that there are comparators in a variety of positions but also including people who are not even in New York, for example. There, we think as a matter of law, those folks are not comparators, under either of the statutes.

And we also think that, as I think Ms. Greene would concede, there are no genuine issues of fact as to the work performed by many of these folks, particularly the folks that are outside of the OCTO organization. And we think that those are legal questions that the Court can and should decide, and would certainly, even if -- and I heard your Honor loud and clear, at the top of your remarks -- even assuming summary judgment were denied, we would like to believe that the case could be meaningfully narrowed so that the trial would be

manageable, because currently, there are some, I think it's 75-plus alleged comparators on the board here, and right now, we don't really know, beyond the mention of Mr. Harteau in the plaintiff's pre-motion letters, which of those folks the plaintiff is actually intending to pursue as comparators for purposes of her discrimination claims. So that, I would say, is one of our principal frustrations and challenges here, because we think the whole case could be decided as a matter of law, but at a minimum it could be substantially narrowed before trial.

THE COURT: If I could just interrupt, I suspect that the plaintiff, as much as you, if that's possible, has little interest in pursuing all those comparators except, of course, they have better insight into their intentions, but you both have equal insight now into what the evidence is. And my guess is that if you sat down with the appropriate preparation, you could find out from the plaintiff which comparators they plan to pursue and which once they don't, and that would substantially narrow the case and could be done in an afternoon.

Go ahead.

MR. GAGE: Certainly, your Honor, if we had an indication that Ms. Rowe was prepared to do that, that would be useful.

THE COURT: Ms. Rowe and Ms. Greene, would that be

something that you would be able to do in anticipation of trial, if that's where we were going?

MS. GREENE: Absolutely, your Honor. As a practical matter, we don't -- we know that there is absolutely no way to, you know, present that number of comparators to a jury in any effective way, and the benefit of discovery is to focus the conversation on who are the proper comparators. That is a conversation that we would be prepared to have, and also because we know that if we don't have that conversation, then we're looking at motions in limine on these issues, and it's better for the parties to consult together to try to move that issue forward.

THE COURT: OK. Mr. Gage, did you want to react to the other issues that we've talked about?

MR. GAGE: I guess I will only briefly. Again, your Honor, we disagree with your comments. We don't think that there would be any genuine issues of fact for a jury to decide even on the intent question. And, you know, if that were always an issue for the jury, then there would never be summary judgment employment discrimination cases, and we know that's not true. And, here, for example, one of the discrimination claims is a claim for an alleged promotion for a job that was never filled. And the facts are undisputed on that.

And so it goes to my earlier point about the plaintiff's claims here covering a very broad spectrum. And

even accepting that not only your Honor has a different view of the world than I do but many other people may, that there may be questions of fact on some of her claims, it still presents us with a situation where what I'm hearing you say is, unless I can get Ms. Greene to negotiate down the scope of her case, we've got to try the whole thing even if we think that there are no genuine issues of fact across the board.

THE COURT: I'm not prejudging the motion, because I haven't read your motion papers; they don't exist yet. But based on what I've read, it just seems highly likely to me that we're looking at a trial here. So perhaps -- I mean, it sounds like one of the benefits of settlement discussion might be that you could have some fruitful discussion about narrowing the case or at least understanding how the plaintiff currently views the case in light of discovery, and try to resolve the case on those terms. And hopefully you would be successful in doing that. But even if you weren't, you would be ahead of the game in terms of understanding what, you know, what the scope of the current case is that's going to trial. And it sounds like the plaintiff is in a position to do that now and likely amenable.

MR. GAGE: Well, your Honor, we certainly -- I'm sorry. This is Ken Gage again. We certainly would be amenable to having those discussions and seeing how they proceed.

THE COURT: So here's the question. Would you like a

referral to a court-appointed mediator, to a magistrate judge, whose name would be picked out of the wheel -- and it would not be Judge Gorenstein -- or do you want to find your own mediator?

Let's start with Mr. Gage.

MR. GAGE: I'm sorry, your Honor. This is Ken Gage.

THE COURT: No. I was just -- I was waiting for whoever would speak to speak. Go ahead.

MR. GAGE: OK. Again, this is Ken Gage for the record.

Your Honor, I -- my own personal preference is just to find a private mediator, because I think some folks are better at dealing with cases like this than others, and rather than taking a random selection -- nothing critical of any of our magistrate judges or mediators, but that's certainly been my preference over time.

THE COURT: OK. Let me ask the plaintiff, would you be amenable to doing that, assuming I presume that the cost of a mediator would be split between the two sides?

MS. GREENE: Yes. We would be agreeable.

THE COURT: OK. So why don't we do this. Why don't we come up with a schedule for you to try to get the case resolved. If that is unsuccessful, then you can file your motion for summary judgment, but perhaps in the course of mediation discussions, you can agree to understand and narrow

the claims better between yourselves. And then you can give me a report on what happened in the mediation and also tell me how we should proceed.

So let let's do this. Why don't I give you a week to talk to each other and try to find a mediator that you agree on. I suspect you both know folks. I will throw out a couple names, only -- and I have no interest in whether you pick these people or anyone else, but just in case you don't have people at hand who you're thinking about: Judge Scheindlin from this district, recently retired, highly respected, is now doing mediations and arbitrations. Another former judge, former chief judge from New Jersey, is Faith Hochberg. She's also doing mediation. And what I would suggest, if you are interested in either of those people, is just to Google them. They're easy to find. And of course if you have someone else who you like to work with, that would be great too.

So why don't I give you a week for you to tell me that you have agreed on a mediator and tell me when you're meeting with the mediator and what you propose as far as a date for getting back to me, because different people have different schedules in terms of mediators.

All right. And then we'll take it from there. And if you're unsuccessful, then you can make a proposal about summary judgment or not, going straight to trial; that's possible too. But let's take one step at a time. And I'll issue an order

today so that it's all clear.

Any questions or anything else you want to talk about?

MR. GAGE: This is Ken Gage, your Honor. Just one question. Given the holiday weekend, could we have until the 8th to report back to you?

THE COURT: Of course.

MR. GAGE: OK. Thank you.

THE COURT: Anything else?

MR. GAGE: Nothing.

MS. GREENE: Nothing from plaintiff.

THE COURT: All right. Thank you, counsel.

MR. GAGE: Thank you, your Honor.

MS. GREENE: Thank you.

MS. TOMEZSKO: Thank you.

(Adjourned)